NO. 277011

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DELBERT WILLIAMS, APPELLANT

v.

LEONE & KEEBLE, INC., RESPONDENT

Appeal from the Superior Court of Spokane County
The Honorable Gregory D. Sypolt
No. 08-2-03318-4

REPLY BRIEF OF APPELLANT

LAW OFFICES OF RICHARD McKINNEY

By: Richard McKinney, WSBA No. 4895
201 W. North River Drive, Suite 520
Spokane, Washington 99201
509/327-2539; Fax: 509/327-2504

Table of Contents

Cases

I.
COLLATERAL ESTOPPEL NOT AVAILABLE AS ALTERNATIVE THEORY FOR L&K

1. Collateral Estoppel may not be raised on Motion to Dismiss. It is well established that in cases where there is no Washington authority, Washington courts look to federal decisions to interpret Federal Rules which are the same as Washington rules. ***Warren, Little & Lund, Inc. v. Max J. Kuney Co.***, 115 Wn.2d 211, 215, 796 P.2d 1263 (1990); ***Carle v. Earth Stove, Inc.***, 35 Wn. App. 904, 907, 670 P.2d 1086 (1983).

In this case, L&K obtained a dismissal on the pleadings with no documentation as to the proceedings before the IIC. However, 5C Wright and Miller, Federal Practice and Procedure, §1368 at pp. 253-54 (3d ed. 2004) emphasizes that there cannot be a judgment on the pleadings based on collateral estoppel. The authors conclude with this language:

> "...it was clear...that matter outside the pleadings would have to be introduced to establish a collateral estoppel defense so that a summary judgment motion rather than one for judgment on the pleadings undoubtedly was the appropriate procedure."

As authority, the treatise at §1379 cites ***City Bank Farmers Trust Co. to Use of Behrens v. Liggett Spring and Axle Co.***, 4 F.R.D. 254

(W.D. Pa. 1945) (specifically forbidding judgment on the pleadings on collateral estoppel issue).

It is woefully insufficient for L&K to mention IIC proceedings, but not to document what occurred in that forum, and then to set up a collateral estoppel defense based upon a motion to dismiss, without attaching any authenticated documentation.

2. **Issue Not Raised Before Trial Court**

Two recent cases hold that collateral estoppel may not be raised for the first time on appeal. ***Spokane County v. City of Spokane***, 148 Wn. App. 120, 197 P.3d 1228 (2009); ***Creech v. AGCO Corp.,*** 133 Wn. App. 681, 687, 138 P.3d 623 (2006).

3. **Collateral Estoppel Does Not Apply to Issues of Law.** ***Nims v. Washington Board of Education,*** 113 Wn. App. 499 and cases cited at n.25, 52 P.3d 52 (2002) squarely holds that collateral estoppel does not apply to issues of law. Even if there were a finding by the IIC of exclusive Idaho jurisdiction for tort claims of Williams (which there was not), such a finding would be a legal determination and therefore, not within the purview of collateral estoppel.

4. **Actual Litigation of Contested Issue is Required.** Even if one analyzes collateral estoppel on the merits, it is every bit as inapplicable as res judicata. ***State Farm Mut. Auto. Ins. Co. v. Avery***, 114

Wn. App. 299, 57 P.3d 300 (2002) states that collateral estoppel bars re-litigation of any issue that was actually litigated in the prior case (emphasis in *Avery* case). *See also* ***Green v. City of Wenatchee***, 148 Wn. App. 351, 362, 199 P.3d 1029 (2009) which refuses to apply collateral estoppel to any issues which were settled between the parties. It is clear in the present case that when the IIC voluntarily made cash payments to Williams who accepted those payments, all issues were settled and not litigated.

5. **Identical Issues Presented in Both Forums.** ***Christensen v. Grant County Hosp. Dist. No. 1***, 152 Wn.2d 299, 96 P.3d 957 (2004), cited on page 11 of L&K's brief, states that collateral estoppel requires that the same identical factual issue be presented in both the first and the second cases. Yet the IIC made no determination as the availability of the Idaho courts or the Washington courts for asserting jurisdiction over Williams' tort claim against L&K. L&K conceded at the trial court level that Washington has personal and subject matter jurisdiction over the parties. CP 107. L&K simply asserts that IIC acceptance of WC jurisdiction in and of itself precludes another state from providing a forum for a tort claim related to the same incident.

Not only is that argument illogical on its face, but it is unsupported by any authority. Indeed, I.C. §72-218 permits a worker to get WC

benefits in another state and then get additional benefits in Idaho for the same incident. Thus, under Idaho law, even within the WC system alone, submission of a WC claim to another state does not prohibit the later submission of the same claim to Idaho.

How then can L&K conclude that submission of a WC claim in Idaho precludes Williams from submitting a related tort claim to a court of general jurisdiction in Washington? L&K tries to finesse this argument by reliance on ***Anderson v. Gailey***, 97 Idaho 813, 555 P.2d 144 (1976).

As stated in Williams' initial brief, ***Anderson*** merely gives the first of two competing tribunals where the same case is filed the right to decide a factual issue. As it did at the trial level, L&K omits the language in ***Anderson*** which requires a final judgment by the first of two competing tribunals before there can be res judicata. Williams quoted this language on pp. 9-10 of his initial appellate brief. ***Anderson*** merely states the familiar "first to file" rule, a doctrine which only applies if the first tribunal eventually issues a final judgment. L&K ignores the "final judgment" language of ***Anderson*** as it ignores Williams' citation of the "first to file" rule as the rationale for ***Anderson.*** Independently of ***Anderson***, the requirement of a prior final judgment applies under both the doctrines of res judicata and collateral estoppel.

6. **Final Judgment Required.** The ***Christensen*** case cited on page 11 of L&K's appellate brief clearly states that a final judgment rendered by the first tribunal is necessary before collateral estoppel is operative. L&K states that paying money constitutes the most final of judgments. That argument is disingenuous at best and purblind at worst. A "final judgment" does not mean the exercise of judgment, but it means a final, appealable order entered after litigation. The mere payment of money by the IIC is at most a settlement which the recent ***Green*** case, *supra*, states does not justify the application of collateral estoppel.

While nothing was adjudicated in the Idaho WC proceedings, it would be a bizarre argument in any event to assert that acceptance by the IIC of jurisdiction over WC benefits somehow constitutes an adjudication that Idaho has exclusive jurisdiction over a tort claim. Yet that is precisely the argument which L&K makes in this case.

Leaving out the possibility of intentionally trying to mislead the Court, L&K's position can only be explained because of an inaccurate analogy to ***Anderson***. ***Anderson*** is different from the present case for two important reasons: 1) There was a final adjudication in ***Anderson*** unlike the present case; 2) The determination of a single fact in ***Anderson*** (whether the claimant was operating within the scope of his duty as a

worker) meant that either a tort claim or a WC claim would be available, but both could not be available.

In contrast, the present case involves no final adjudication by the IIC. Moreover, in the present case there is no logical reason why there cannot be a tort claim and a WC claim at the same time. Indeed, L&K says that both remedies are available to Williams in this case. L&K brief, page 19.

7. **Injustice in application of collateral estoppel.** Finally, even if the same factual issue applied in the IIC proceeding and the tort case (which it did not), and even if there were a final adjudication by the IIC (which there was not), collateral estoppel should still not apply when doing so works an injustice. ***Christensen,*** *supra* at 307. There was no notice that acceptance of Idaho benefits would preclude a Washington tort action. Collateral estoppel cannot apply to support a finding which was only tangential to the finding of the first tribunal. ***Barr v. Day***, 69 Wn. App. 833, 854 P.2d 642 (1993) *reversed on other grounds, affirmed in part,* 124 Wn.2d 318, 879 P.2d 912 (1994).

CONCLUSION

Despite the significant back-pedaling by L&K in trying to replace res judicata with collateral estoppel, there are seven independent reasons why collateral estoppel does not support the judgment entered

on behalf of L&K. Each of these reasons is sufficient in itself to justify reversal of the judgment below. Collectively, the case for reversal is overwhelming. All other issues discussed below anticipate the choice of law issue which the trial judge avoided in granting L&K's motion to dismiss on res judicata grounds.

II.

CONSENT BY L&K TO IDAHO JURISDICTION OF THE TORT CLAIM DOES NOT REMEDIATE THE LACK OF JURISDICTION

There is a substantial issue as to whether Idaho bars Williams from its courts in asserting a tort claim against L&K. Both parties have briefed that issue. However, L&K asserts that regardless of how a court might resolve that issue, the acquiescence of L&K to jurisdiction in Idaho opens the Idaho courts to Williams under the doctrine of collateral estoppel. Regrettably L&K is currently as oblivious to the various sub-categories of estoppel as it originally was to the distinction between res judicata and collateral estoppel

Even if both parties consent to subject matter jurisdiction in Idaho, the Court may sua sponte dismiss a case for lack of subject matter jurisdiction. ***Erickson v. Idaho Board of Registration of Professional Engineers***, 203 P.3d 1251 (March, 2009); ***State v. Armstrong,*** 146 Idaho

372, 195 P.3d 731 (Idaho App. 2008) (parties cannot be estopped from asserting lack of subject matter jurisdiction); ***Fairway Development Co. v. Bannock County***, 119 Idaho 121, 804 P.2d 294(1990); ***Bolden v. Bolden,*** 118 Idaho 84, 794 P.2d 1140 (1990) (stipulation to hypothetical "fund" does not create justiciable controversy which creates jurisdiction of the court).

Subject matter jurisdiction includes strict adherence to a court's power to act pursuant to local law. 21 C.J.S. *Courts* §85 (updated 2009) and see specifically, ***Riviera Equipment Inc. v. Omega Equipment Company,*** 145 Ga. App. 640, 244 S.E.2d 139 (1978) (stipulated judgment which provides for non-statutory remedy may not cause court vested with limited statutory remedies with jurisdiction to impose the contractual remedy).

Thus, it is meaningless for L&K to provide its sanguine reassurances that the obvious lack of jurisdiction in Idaho is overcome because of consent by L&K to Idaho jurisdiction. L&K relies, incorrectly, on the doctrine of collateral estoppel. (page 20 of L&K appellate brief) Having claimed to rectify its confusion between res judicata and collateral estoppel, L&K is still getting its "estoppels" confused. Collateral estoppel has nothing to do with a party's consent to jurisdiction. That is obvious by

looking back on the definition of collateral estoppel which requires a final adjudication of a contested issue.

Undoubtedly, the doctrine sought to be invoked by L&K is judicial estoppel, most recently discussed by the Supreme Court in ***Ashmore v. Estate of Duff***, 2009 WL 1014590 (April 2009). Judicial estoppel seeks to bind a party to a position which it had previously taken with a court, thus preventing that party from playing "fast and loose" with the court by successfully taking inconsistent positions. Yet, for three separate reasons, judicial estoppel is also unavailable to vest Idaho courts with subject matter jurisdiction over Williams' tort claim against L & K.

1. Judicial estoppel only applies if a party takes a factual position that is inconsistent with his factual position asserted in earlier litigation. ***Miles v. CPS***, 102 Wn. App.. 142, 6 P.3d 112 (2000) and cases cited at n.21 of ***Miles***. L&K has simply expressed its opinion on the jurisdiction of Idaho courts to try Williams' tort claim. This is not a factual position sufficient to invoke judicial estoppel.

2. Judicial estoppel only applies if the prior inconsistent position has been accepted by the first court. ***Johnson v. Si-***

Cor Inc., 102 Wn. App. 902, 908-09, 28 P.3d 832 (2001). In L&K's hypothetical scenario, Williams will file a tort claim in Idaho and L&K will be estopped from challenging the jurisdiction of Idaho to adjudicate the tort claim. Even if L&K's acquiescence to Idaho jurisdiction over the tort claim were a factual position (which it is not), Judge Sypolt never ruled on L&K's concession of jurisdiction over the tort claim by the Idaho court. There is nothing in his order which reflects his acceptance of L&K's invitation to expand Idaho's jurisdiction beyond the scope of Idaho's statutory restrictions.

3. In Idaho, the application of judicial estoppel is discretionary with the trial court. ***Lawrence v. Hutchinson***, 204 P.3d 532, 541 (Idaho App. 2009). Therefore, even if all the other prerequisites of judicial estoppel were in place (and they are not), there could be no assurance that an Idaho trial judge would even apply the doctrine of judicial estoppel.

CONCLUSION

L&K's acquiescence to jurisdiction in Idaho is a charade. It cannot consent to subject matter jurisdiction which otherwise does not exist. Judicial estoppel (not collateral estoppel) does not help Williams establish jurisdiction in Idaho. While not in the record, the Third-Party Recovery Section for the Idaho State Insurance Fund has said flatly that it cannot hire Idaho counsel to recover in a third party action the hundreds of thousand of dollars which it has expended for Del Williams. The reason why it cannot do so is because there is no jurisdiction to bring a third party action against L&K in Idaho.

III.
CONFLICT OF LAW ANALYSES FOR DISTINCT ISSUES

Inexplicably, L&K states (page 21 of its brief), "Without any citation to Washington authority, the plaintiff self-servingly and erroneously proclaims that Washington courts require a distinct analysis for each legal issue where the law of the relevant states is different." This Court will have to read the three Washington cases cited on page 18 of Williams' initial appellate brief to determine which counsel is unmindful of Washington law on this important issue.

The issue is important because Williams' position is that different conflict analyses apply to different issues. For example, Williams concedes that Idaho law would apply in determining fault of the parties. As previously cited, issues of fault are nearly always determined according to the law of the state where the wrongful conduct occurred. ***Ellis v. Barto***, 82 Wn. App. 454, 918 P.2d 540 (1996) states that rules of the road of the state where the wrongdoing occurred should apply. This is obvious; otherwise a German national who injures a fellow German passenger on the roads of Washington may be exonerated in tort for driving 90 miles per hour because that speed is permitted on the autobahn in Germany. The RESTATEMENT and the law of virtually every jurisdiction have agreed that the rules establishing the wrongful conduct are almost always governed by the place of the wrongdoing. RESTATEMENT (SECOND) CONFLICT OF LAWS, §145 comment d (1971).

Thus, Williams concedes that Idaho's OSHA standards established the standard of care for assessing the fault of L&K and assessing the fault of Williams. The concession of this obvious point avoids the chimera of doom forecast on pp. 25-27 of L&K's appellate brief. As a postscript, however, it is helpful for this Court to remember that the safety expert of L&K testified that in this case there were no different standards of conduct

under OSHA or under WISHA in evaluating fault for the accident at issue in this case. (Hoctor deposition, CP 67-89)

However, Williams challenges the other part of ***Ellis*** – that any rule of law touching on comparative negligence should be the law of the place of injury. As previously noted, the ***Ellis*** rule in this regard reflects the RESTATEMENT (SECOND) CONFLICT OF LAWS §164 (1971). However, virtually all of the reported cases in the nation during the past 40 years have applied the law of the place of the common domicile of the plaintiff and defendant for comparative negligence to the extent that comparative negligence is a rule of loss allocation rather than a standard of conduct. Idaho's rule that 50% comparative negligence of the plaintiff bars all recovery is a rule of loss allocation, not a rule establishing standards of conduct. As such, the dicta in ***Ellis***[1] should be modified so that comparative negligence is not considered a "rule of the road" determined by the law of the place of wrongdoing.

Plaintiff has in his initial brief referenced the nearly unanimous body of modern case law which departs from §164 of the RESTATEMENT (SECOND) when the plaintiff and defendant have a common domicile in a different jurisdiction than the place of wrongdoing. This is a significant

[1] ***Ellis*** was decided based upon the interstate compact which applies the statute of limitations of the state of the forum. All the discussion in ***Ellis*** about "rules of the road" is therefore dicta.

development in the law that has occurred since the adoption of the RESTATEMENT (SECOND) in 1971.

Idaho has no interest in allocating losses between two Washington residents. Therefore, Idaho's law should not determine loss allocation issues between the parties. ***Ellis*** should be modified to the extent that it is inconsistent.

IV.

THERE IS A SPECIAL CONFLICT OF LAWS RULE FOR PERSONAL INJURY CASES.

The three cases originally cited by Williams and repeated at footnote 8 of L&K's brief do amount to a special conflict of laws rule for personal injury cases. That rule for personal injury cases is based upon §146 of the RESTATEMENT (SECOND) whereas the general rule for most cases is based upon §145 of the RESTATEMENT. §146 and the three cited Washington cases require that each "particular issue" of the law of the state where the injury occurred applies unless another state has a greater interest as to that issue. This is another way of saying that there is a presumptive application of the lex loci, but the presumption can be overcome if a state other than the place of wrongdoing has a greater interest in applying its law. ***Bush v. O'Connor,*** 58 Wn. App. 138, 144, 791 P.2d 215 (1990) cited in Williams' initial appellate brief, confirms

this special conflict of laws rule for personal injury cases with the following language:

> "In large part, the answer to the [choice of law] question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue [involved]." (emphasis supplied to demonstrate that each legal issue is subject to a separate conflict of law analysis)

The complicated "two step" analysis of § 145 and § 6 (which has seven subcomponents) does not apply in personal injury cases. However, § 146 (involving personal injury cases) cross references to the seven part test of §6 of the RESTATEMENT. §6 provides the criteria which are helpful to a court in determining which state has a superior interest with reference to a particular legal issue. The following is a brief summary of the seven criteria of §6 in relationship to the issue of loss allocation between two Washington residents.

a) "The Needs of the Interstate and International System."

The comment to §6(2) (a) seems to say that the needs of the system include a uniform choice of law rule. Since Plaintiff is attempting to conform his analysis to the RESTATEMENT protocol for choice of law, Plaintiff is complying with the apparent requirements of § 6 (2) (a). If

Washington applies the law of common domicile of both parties with regard to a loss allocation issue, its rule would become "uniform" with the majority choice of law rule in the country.

b) **"The Relevant Policies of the Forum."**

Various Washington cases speak to the policies of Washington which are relevant to the present case. ***Johnson v. Spider Staging Co.***, 87 Wn.2d 577, 581, 555 P.2d 997 (1976) *supra* in Williams' initial appellate brief at 583, finds that Washington has an interest in imposing Washington law over a Washington corporation whose tortious actions caused a death in another State. ***Johnson*** states that Washington's interests are to deter conduct by its corporations which wrongfully harm another person and to strengthen the deterrent aspect of Washington's civil sanctions.

Johnson directly applies to the present case. Leone and Keeble, Inc., is a Washington corporation, which was the general contractor on the construction project at issue. This job was located in Idaho, but L&K was obligated to enforce the same safety standards in Idaho as it would have enforced to protect Plaintiff under the same circumstances in Washington. From its Washington office in Spokane, L & K adopted the safety standards applicable to this case in Washington. CP 54-60.

Johnson is further applicable in the present case because the liability insurance of the Washington defendant in that case applied equally in all fifty states. The insurance policy of Leone and Keeble, Inc. protects it equally for its negligence in Washington and in Idaho. CP 50-53. ***Johnson*** holds that the Washington defendant in that case did not justifiably rely on more favorable law in Kansas (the place of the accident) than in Washington because its insurance applied in all 50 states. Under the same reasoning, Leone and Keeble, Inc., has no basis upon which it may assert that it justifiably relied upon more favorable law in Idaho. CP 54-60; 61-66; and 90-92. *See also* ***Schultz v. Boy Scouts of America, Inc.***, 65 N.Y.2d 189, 480 N.E.2d 679 (1985) which emphasizes, in choice of law analysis, the expectation of the parties is fictional in the context of a tort claim.

Washington has an interest in protecting its resident, Plaintiff in the present case, from being uncompensated after suffering tortious conduct. This interest is an "overriding" concern and should be balanced in the weighing process although this interest is not sufficient reason by itself to apply Washington law. ***Rice v. Dow Chemical Co.***, 124 Wn.2d 205, 215, 875 P.2d 1213 (1994).

c) **"The Relevant Policies of Other Interested States and the Relative Interests of Those States in the Determination of the Particular Issue."**

Clearly, Idaho has policies "to protect defendants from excessive financial burden [and] to eliminate speculative claims and difficult computational issues." The clear language comes directly from page 582 of ***Johnson***, *supra*, wherein Kansas, the place of injury in that case, had a low statutory damages limitation for wrongful death claims. However, ***Johnson*** applies the law of Washington, the state of residence of the defendant corporation. ***Johnson*** reasons that the policies of Kansas are primarily local, i.e. reflective of an interest in protecting Kansas residents.

Johnson cites with approval ***Hurtado v. Superior Court***, 11 Cal.3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) as authority for not imposing a Mexican damages limitation statute upon a defendant who was sued in a California court for an injury which the defendant caused to a Mexican national in California. ***Hurtado*** holds that Mexico has no interest in imposing its damages limitation statute to benefit a California resident.

By analogy to ***Hurtado*** and ***Johnson***, Idaho has no interest in the present case in imposing its non-liability statute to favor a Washington corporation.

This conclusion is consistent with many sections of the RESTATEMENT (SECOND) OF CONFLICTS. The following RESTATEMENT sections confirm that Idaho has no interest in imposing its non-liability statute to benefit Leone & Keeble, Inc., a Washington corporation.

1. ***Johnson***, *supra*, specifically cites §175 of the RESTATEMENT (SECOND) which relies upon §145. Comment c to §145 states:

> "A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice of law process as is a rule which imposes liability. Frequently, however, it will be more difficult to discern the purpose of a rule denying liability than a rule which imposes it."

In Re Air Crash Disaster at Mannheim Germany on September 11, 1982, 575 F. Supp. 521 (E.D. Pa. 1983) elaborates upon this principle by stating there is a "false conflict" (i.e. no conflict) if the law of one of the states protects defendants, but the defendant at issue is not from that state. In such an instance the law of the state protecting plaintiffs should apply if the plaintiff is from the state which has law protecting plaintiffs. In the present case, Idaho law protects general contractor defendants from suit by subcontractors' employees, but L&K is not from Idaho. Thus, Idaho has no interest in applying its law and there is a "false conflict."

2. Comment d to §145 of the RESTATEMENT (SECOND) states:

> "On the other hand, the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other...."

This quotation precisely fits the fact pattern of the Williams case. The cited quotation suggests that the law of Washington (the state of common domicile) should determine whether L&K is granted immunity from liability. §145 has been referenced with approval by numerous Washington decisions including ***Bush,*** *supra.*

3. §156 comment f of the RESTATEMENT (SECOND) states that a court should apply the law of the parties' domicile if there are to be exceptions to tort liability, particularly when immunity of the defendant is based upon the defendant's relationship to the plaintiff. Under Idaho Statute §72-223(1) the relationship which creates the immunity of L&K is the relationship of the employer-employee (with L&K defined as an employer of plaintiff under Idaho Statute §72-216).

§§ 145 comments c and d, 156 comment f, 159 comment b, and 161 of the RESTATEMENT (SECOND) all invoke the law of the parties'

common domicile if the rule of law under a conflict analysis relates to immunity between the plaintiff and defendant. .

d) "The Protection of Justified Expectation."

It will be difficult for the defense to argue that Defendant permitted lower safety standards in Idaho because it relied on immunity from tort liability. Indeed, Paul Keeble denied that L&K so relied. (CP 54-60) It is even more difficult to conceive of a Washington Court giving deference to such expectations.

The authorities agree that such a position is not meritorious. Comment g to §6 of the RESTATEMENT (SECOND) states:

> "There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice of law question."

As noted above on page 17, there is no reliance on a particular state's law in the context of a tort action.

e) **"The Basic Policies Underlying the Particular Field of Law."**

This Memorandum has already quoted comment c to §145 of the RESTATEMENT (SECOND) which states that it is frequently difficult to divine the state interest underlying a lack of imposition of liability. Moreover, in treating the closely related legal question of forum non-convenience, our Courts have held that Washington will not defer to the law of another jurisdiction which provides no remedy for wrongful conduct. ***Sales v. Weyerhaeuser Co.,*** 138 Wn. App. 222, 228, 156 P.3d 303 (2007) (an alternative forum is adequate so long as some relief, regardless how small, is available to plaintiff); ***Hill v. Jawanda Transport Ltd.***, 96 Wn. App. 537, 541, 983 P.2d 666 (1999). *See also* ***Phoenix Canada Oil Co. v. Texaco, Inc.***, 78 F.R.D. 445 (D. Del. 1978) (U.S. Court will not transfer case to Ecuador where no remedy is granted).

Deferring to the law of Idaho, which would deny Plaintiff, *any* judicial remedy, would not fulfill any interest of Idaho, but would contravene well recognized interests of Washington. Once again, Washington has policies against leaving its resident without any effective remedies whatsoever and in favor of regulating its domestic corporations.

f) **"Certainty, Predictability and Uniformity of Results."**

This test rather begs the question because any judicial ruling provides certainty. To the extent that the law is not yet clear, the present case will provide the requisite certainty in the future. However, Plaintiff respectfully suggests that the law is already certain and should remain certain so that a Washington general contractor whose negligence injures a subcontractor's employee domiciled in Washington, should always be bound by Washington law rather than by a rule of immunity.

g) **"Ease In the Determination and Application of the Law To Be Applied."**

Both Idaho law and Washington law are easy to determine. That factor is of little benefit in this case in analyzing which state's law should be applied.

Bush, *supra,* states that a superior interest of a state other than the state of the injury is the foremost factor in applying the law of another state. The foregoing review of the criteria under § 6 suggests that an interest analysis is the major factor in deviating from the law of the state of injury. The only state in this case which has an interest in loss allocation between Williams and L&K is Washington. The rules of law

which relate solely to loss allocation include the following at the very least.

1. Whether L&K should be granted statutory immunity under Idaho Code §72-223(1).
2. Whether Williams is barred from any recovery if he has fault equal to that of L&K (Idaho comparative negligence rule)
3. Whether the fault of Pro-Set Erectors is deducted from the recovery of Williams (Idaho rule) rather than ignoring the fault of Pro-Set in the action between Williams and L&K (Washington rule).

It is certainly premature to determine in this appeal which Washington rules apply and which Idaho rules apply. However, there is not an "all Idaho" or "all Washington" requirement as implied by L&K (page 21 of its brief). The limited issue as to whether ***Ellis*** should be modified to the extent that comparative negligence deals with loss allocation is ripe for decision by the court of appeals because the parties have briefed that issue. *See* ***Biggers v. City of Bainbridge Island***, 1562 Wn. 2d 683, 169 P.3d 14 (2007).

CONCLUSION

It is clear that the conflict of laws issues remain hotly disputed between the parties. It is just as clear that collateral estoppel may not be asserted at the eleventh hour and is, at any event, inapplicable in this case. Accordingly, it would be most helpful if this Court were to retain jurisdiction over this case while remanding it to the trial court for determination of the conflict of laws issues. It would also be very helpful if this Court were to give some guidance as to whether ***Ellis*** still applies to loss allocation issues, particularly when the two parties reside in a single state other than the state of wrongdoing.

No matter how the Court decides to address the conflict of law issues, it should be evident beyond any dispute that collateral estoppel and res judicata and judicial estoppel and waiver of lack of subject matter jurisdiction have no place in this case. These doctrines have been imported into this case by an attorney who confesses to resentment over too much scholarship.

RESPECTFULLY SUBMITTED this 26th day of May, 2009.

RICHARD McKINNEY, WSBA No. 4895
Attorney for Appellant Williams

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2009, the original and one (1) copy of the **Reply Brief of Appellant** were filed with the Court of Appeals of the State of Washington, Division III, at the following address:

COURT OF APPEALS, DIVISION III
Office of the Clerk
500 N. Cedar Street
Spokane, Washington 99201-1905

In addition, I served one (1) copy of the **Reply Brief of Appellant**, via hand delivery, to the following:

Andrew C. Bohrnsen
9 South Washington, Suite 300
Spokane, Washington 99201

I certify under penalty of perjury, according to the laws of the State of Washington, that the foregoing is true and correct.

Mary A Rua

Mary A. Rua